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No. 01-687

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

LEONARD COTTON, et al.,
Respondents.

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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

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BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Does a federal district court lack jurisdiction under 18 U.S.C. § 3231 and the Grand Jury Clause of the Fifth Amendment, or otherwise lack authority, to sentence for a greater degree of offense than that charged in the indictment, so that a penalty in excess of the maximum allowed by law for the charged level of offense must be vacated on direct appeal, regardless of any failure of counsel to object to the sentence in the district court?

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BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) and FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION (FAMM) submit this amicus brief pursuant to this Court's Rule 37.2(a) in support of respondents' opposition to the Solicitor General's petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Petitioner and the respondents have granted consent to file this brief, and letters of consent have been or will be filed with the Clerk of this Court.[1]

INTERESTS OF THE AMICI

Amici curiae are the nation's leading criminal defense bar association and a grass-roots criminal justice reform organization comprising family members and other supporters of prisoners serving mandatory minimum sentences. Both amici frequently have been granted leave to file amicus briefs in this Court, often jointly, and their counsel and leading members have argued many cases involving points of sentencing law in

[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than NACDL and FAMM made any monetary contribution to its preparation or submission.

this Court.[2]

ADDITIONAL STATUTE, RULES AND CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; ...."

Title 18 of the United States Code provides, in pertinent part:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> * * * *

The Federal Rules of Criminal Procedure provide, in pertinent part:

> **Rule 7. The Indictment and the Information**
>
> * * * *
>
> (c) **Nature and Contents**
>
> (1) **In General.** The indictment ... shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. ...
>
> **Rule 12. Pleadings and Motions Before Trial; Defenses and Objections**
>
> * * * *
>
> (b) **Pretrial Motions.** Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. ... The following must be raised prior to trial:
>
> * * * *
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); ....
>
> * * * *

[2] The interests of the two amici are spelled out in more detail in the Addendum to this Brief.

AMICI'S BRIEF IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO CERTIORARI

Because the asserted split in the Circuits is not deeply ingrained, and because a logically necessary prior question of statutory construction went unexplored below and is not mentioned in the petition, this is not an appropriate case in which to grant certiorari on the constitutional question presented by the petition.

Respondents were convicted of a federal drug conspiracy and sentenced to life imprisonment, although the indictment described an offense which carries a penalty of no more than 20 years. The Fourth Circuit refused to countenance these illegal sentences. The government urges this Court to grant certiorari and adopt a rule of "plain error" under which the defendants' failure to object, coupled with supposedly overwhelming evidence, would authorize appellate affirmance of concededly invalid sentences (Pet. 11) of life without parole.

For several reasons in addition to those well articulated in the respondents' Brief in Opposition, this petition should be denied.

1. The asserted circuit conflict, although real, is of recent origin and is not deeply ingrained. Further developments in the circuits can be expected to illuminate the question presented, and its jurisprudential antecedents, in helpful ways.

The Solicitor General's petition for a writ of certiorari frames the issue in this case in terms of "[w]hether the omission from a federal indictment of a fact that enhances the statutory maximum sentence requires a court of appeals automatically to vacate the enhanced sentence ...." Pet. i. The issue, however, necessarily derives from a case arising under particular congressional enactments, Sections 401 and 406 of the Controlled Substances Act of 1970, as amended, *reprinted as* 21 U.S.C. §§ 841, 846.[3] The Solicitor General's formulation of the issue assumes resolution, favorable to the government, of a number of jurisprudentially antecedent, but unresolved, issues. The underlying issues are still "percolating" in the circuits, as is the issue of application of "plain error" review to convictions and sentences that are

[3] The statute conventionally known as 21 U.S.C. § 841 (1994 ed. & Supp. IV 1998) is properly referenced as the Controlled Substances Act of 1970, Pub. L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260, as amended (the "CSA"). The distinction is pertinent to the argument. *See, e.g., United States v. Vazquez*, 271 F.3d 93, 111-12 (3d Cir. 2001) (en banc) (Becker, J., concurring) (captions "Unlawful acts" and "Penalties" do not appear in controlling statute but only in unofficial U.S. Code version). Except where essential, *Amici* employ the conventional reference.

unsupported by the indictment, because the indictment charges only a lesser grade of offense.

For instance, the petitioner, despite the government's previous arguments to the contrary, now attempts to concede that the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "requires drug quantity to be charged in a federal indictment to support an increase in the statutory maximum sentence." Pet. 10 n.2. The petitioner acknowledges that the courts of appeals uniformly concluded before *Apprendi*, based on purported statutory construction vigorously advanced by the government, that threshold drug amounts were congressionally intended sentencing enhancement factors. Pet. 9. Yet the petition offers no argument and no support in this Court's cases for the government's current position that such supposedly intended sentencing enhancement factors may nevertheless be *treated*, by judicial fiat, as if they were elements for indictment and submission to the jury, even though Congress did not intend them to *be* elements. Rather, it merely cites the majority opinion in *United States v. Promise*, 255 F.3d 150, 156-57 (4th Cir. 2001) (en banc).[4]

[4] Notably, the government's petition does actually defend the construction of § 841 adopted by the court below, which is doctrinally unsupportable. Only Congress can define the elements of a federal offense. *Bousley v. United States*, 523 U.S. 614, 620-21 (1998); *Staples v. United States*, 511 U.S. 600, 604 (1994). A new constitutional decision by this Court in a state case cannot somehow convert what was not an element of a federal offense into an "element." Under well settled precedent addressing the limits of judicial review, if Congress intended drug type and amount to be sentencing factors, a court must honor that intent in subjecting § 841 to judicial review; it cannot contradict properly determined congressional intent, even if it would be expedient to do so. A court may certainly use avoidance of a constitutional problem as a tool of statutory

That case (like many cases of the last two years from various circuits) finds somewhere in *Apprendi* authority to contradict a (supposedly) definitively construed congressional enactment. *See Promise*, 255 F.3d at 156 ("Congress intended these specific threshold quantities to be sentencing factors rather than elements of the aggravated drug trafficking. ... *Apprendi* dictates that in order to authorize the imposition of a sentence exceeding the maximum allowable without a jury finding of a specific threshold drug quantity, the specific threshold drug quantity must be treated as an element of an aggravated drug trafficking offense"); *accord*, *Thomas*, slip op. at 10-12. Despite the government's attempted strategic concession, the question whether § 841, construed as containing congressionally defined sentencing enhancement factors, survives judicial review for constitutionality under *Apprendi* is unresolved in the lower courts, and is the subject of current *en banc* proceedings in the Ninth Circuit. *See United States v. Buckland*, 259 F.3d 1157 (9th Cir. 2001), *vacated for rehearing en banc*, 259 F.3d 1169 (9th Cir. 2001) (argued Sept. 26, 2001).

Moreover, logically prior to any application of the constitutional doctrine of *Apprendi* to § 841 is the question of statutory construction as to whether, without expressly saying so, Congress intended the threshold drug amounts in § 841(b)(1) to be sentencing enhancement

_____(footnote continued)

construction (*see, e.g.*, *United States v. Lopez*, 514 U.S. 549, 562 (1995); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); *see also Jones v. United States*, 526 U.S. 227, 239-40 (1999)), but surely no court may rewrite a statute as a response to realizing that the law, construed as intended by the legislature, would otherwise be unconstitutional. *Miller v. French*, 530 U.S. 327, 339 (2000).

factors, rather than elements of graduated offenses of greater and lesser severity. *See, e.g.*, *Castillo v. United States*, 530 U.S. 120 (2000); *Jones v. United States*, 526 U.S. 227 (1999); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). While the *Almendarez-Torres* statutory inquiry has very rarely been conducted in § 841 cases, the results of that inquiry have been widely divergent. *Compare Promise*, 255 F.3d at 168-82 (Luttig, J., concurring, joined by Wilkinson, Niemeyer & Gregory, JJ.) (concluding that Congress intended facts in § 841(b) to be sentencing factors within the framework of a single offense, defined in § 841(a), that carries a maximum sentence of life imprisonment) *with United States v. Vazquez*, 271 F.3d 93, 107-15 (3d Cir. 2001) (en banc) (Becker, Ch.J., concurring, joined by Ambro, J.) (demonstrating, on thorough review of statutory language, structure, and history, that Congress intended drug type and amount to be offense elements of greater and lesser offenses defined not in § 841(a) itself but in § 841(b), which incorporates subsection (a)). It is this Court's practice, in general, to determine not merely whether there was "error," but also precisely what the error was, before applying the "plain error" rule. See *Johnson v. United States*, 520 U.S. 461, 467 (1997).

The presence beneath the question presented in this petition of these unresolved, yet fundamental, questions "of inestimable importance" regarding the interaction between *Apprendi* and § 841 (*Promise*, 255 F.3d at 169 (Luttig, J.)), makes it all the more relevant that this very issue, *i.e.*, the application of "plain error" review to § 841(b) convictions or sentences that are unsupported by the indictment, is pending before another circuit sitting *en banc*, *United States v. Longoria*, Nos. 00-50405 *et al.*

(5th Cir., argument tentatively scheduled for week of January 21, 2002), and was applied by yet another, sitting *en banc*, on the very day this amicus brief is being edited. See *United States v. Thomas*, Nos. 98-1051 *et al.* (2d Cir., filed Dec. 12, 2001). In both cases, the necessarily prior questions of whether Congress created drug type and amount as offense elements and whether, if not, the statute survives judicial review for constitutionality under *Apprendi* was fully briefed.[5]

The government's petition assumes that a conviction and sentence, predicated on a facially valid indictment for a lesser offense and brought under a statute that may violate *Apprendi* as to various related, more severely punished levels of offense, should be analyzed as "the omission from the indictment of an essential element (or sentence-enhancing fact)." Pet. 15. First, this case does *not* involve an indictment which fails to charge all the elements of a federal offense, as discussed in *Hamling v. United States*, 418 U.S. 87, 117 (1974); *Hagner v. United States*, 285 U.S. 427, 433 (1932); or *Ex parte Bain*, 121 U.S. 1 (1887). What the indictment here lacks, if

[5] In the *Longoria* proceeding, the Fifth Circuit has questioned the continuing validity of its decision in *United States v. Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 1152 (2001). Along the lines of the *Promise* majority, *Doggett* reasserted that Congress in § 841(b) intentionally created sentencing enhancement factors, not elements, but held that *Apprendi* required the panel to "find in the opposite" of that (supposed) congressional intent. That is the same position just adopted by a unanimous Second Circuit in *Thomas*. Yet is difficult to understand, jurisprudentially, how *Apprendi* could "require" any such thing. A new constitutional decision by this Court in a state case does not somehow convert what was not an element of a federal offense -- a pure question of statutory construction and Congressional intent -- into an "element."

anything, is the averment of a fact necessary to charge the more serious grade of offense for which the government seeks to inflict punishment. Thus, the "error" claimed by the respondents-defendants in their appeal, from which the government's petition arises, lies not in the indictment but in the sentence. The assumption underlying the government's petition is unwarranted (*i.e.*, that it makes no difference whether the indictment, as framed, does or does not fully state an offense, even if not one as serious as the prosecutor wishes were charged). Proper resolution of the unresolved issues which are logically and jurisprudentially prior to a "plain error" analysis -- the most important being the precise nature of the "error" (is it in the indictment, or in the sentence?) -- will make a dramatic difference in properly assessing the consequences of that error.

If, as *amici* suggest, this Court voided the New Jersey statute under review in *Apprendi* because the Constitution denies to legislatures any power to assign judges the authority to determine additional, maximum-extending operative facts after the jury renders its verdict, *see Apprendi*, 530 U.S. at 490, and if 21 U.S.C. § 841 is such a statute (as all the circuits had held[6]), then the absence of constitutional authority for the statute precludes its application to impose, or affirm, any sentence. *See United States v. Chambers*, 291 U.S. 217, 222-23, 226 (1934).[7]

[6] *See* note 17 *post*.

[7] The unanimous opinion by the Chief Justice in *Chambers* held that pending prosecutions under the National Prohibition Act automatically abated as soon as the only constitutional authority for that Act, the 18th Amendment, was repealed by adoption of the 21st Amendment.

In contrast, if Congress intended drug type and amount to be § 841 offense elements, then thousands have been sentenced for congressionally defined aggravated offenses for which they were not indicted or convicted, and their illegal sentences are retroactively subject to correction on collateral attack. *Tinder v. United States*, 345 U.S. 565 (1953).[8] If, as the Solicitor General has unsuccessfully urged in recent *en banc* proceedings in various circuits, Congress in § 841 created some novel sort of operative fact, intentionally failing to designate it as either an element or a sentencing factor, see *United States v. Brough*, 243 F.3d 1078 (7th Cir. 2001), then an entirely new analysis of the import of such "facts" under the Fifth Amendment "grand jury clause" and Sixth Amendment "notice" and jury trial clauses will be needed.[9]

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[8] Under the elements interpretation, sentences for aggravated offenses would be invalid as to their mandatory minima, as well as their maxima. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A). Having made this bed by aggressively pursuing a convenient reinterpretation of § 841 following *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the government now, perhaps understandably, hesitates to lie in it.

[9] The never-before-suggested interpretation of § 841 posited in *Brough* is of dubious validity, at best. *See Miller v. French*, 530 U.S. 327, 339 (2000) (federal court "cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question," quoting *United States v. Locke*, 471 U.S. 84, 96 (1985) (in turn quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933) (Cardozo, J.)); *Hill v. Wallace*, 259 U.S. 44, 71 (1922) (Taft, Ch.J.) (severability analysis "does not give the court power to amend the act"). Judicial review is limited to upholding or striking down the provision enacted by Congress. *See United States v. Jackson*, 390 U.S. 570, 572-82 (1968) (death penalty provision applicable only to those exercising right to jury trial voided; rejecting Government's proposed extra-statutory procedural overlays).

The unresolved issues are profound and surely deserving in their own right of full treatment by the lower courts -- and eventually, in the right case, by this Court -- instead of resolution by tacit assumption and strategic concession on the part of the government. For this Court to grant the government's petition at this time will not help resolve any of those issues, but rather will only stop a healthy development of judicial understanding of the seemingly narrow, but ill-framed, question presented, presently underway in the circuits. A grant in this case would also risk terminating inquiry into the underlying issues that the government's petition avoids by unwarranted assumption. Moreover, it may have the effect of thrusting all the unresolved issues upon this Court in the form of alternative grounds (or necessarily included questions) for affirming the judgment below, with the likely result that the question purportedly presented will not be reached by the Court. For these reasons, the Court should deny the petition in order to allow further development of the issues. Meanwhile, the judgment below should stand.

2. The petition wrongly assumes that "plain error" is the applicable standard, where the respondents' illegal-sentence argument was presented to the first court with authority to rule on it in their favor, and any failure to raise it in the district court made no difference.

The government's petition should also be denied because it assumes, rather than presents, an important but undecided question about the scope of the "plain error" rule, Fed.R.Crim.P. 52(b). The petitioner asserts that "all claimed errors in federal criminal trials, regardless of their nature or seriousness, are subject to the

plain-error rules set out in Rule 52(b) ...." Pet. 12. As a necessary predicate to its artfully framed Question Presented,[10] the petition further asserts that Rule 52(b) applies to the illegal sentences imposed in this case, Pet. 12-14, even though that error did not occur "in [a] federal criminal *trial*" but rather at sentencing, and even though an objection at that time to the now-conceded illegality would have been utterly futile and entirely bootless.[11]

Under the scheme of offenses Congress created, plain-error or harmless-error review cannot save the respondents' sentences, notwithstanding this Court's decisions in *Johnson v. United States*, 520 U.S. 461 (1997), and *Neder v. United States*, 527 U.S. 1 (1999), on which the government principally relies. First, *Neder* looked strictly at the "accuracy" of an incomplete verdict; its rationale is inconsistent with the Constitution if the Constitution provides a "political" allocation of criminal decision-making authority between the State (judges) and the citizenry (juries). *Compare id.* at 15 *and id.* at 30-32 (Scalia, J., dissenting). In *Apprendi*, the Court established that the Constitution indeed provides such a "political" allocation; the rationale of the *Apprendi* majority is identical in basis to Justice Scalia's dissent in *Neder*. *Apprendi*, 530 U.S. at 478, 479 n.6; *see also id.* at 498-99

[10] Your Amici have attempted to counter-state the Question Presented (page i *ante*) in a non-argumentative manner which does not prejudge or assume the answer to any of the subsidiary issues. If certiorari is granted in this case, the Court should make clear that it wants the critical underlying issues addressed, not assumed.

[11] Respondents claim that their objections to the PSI's assertions of drug quantity constituted a sufficient raising of the issue to avoid plain error review. Br. in Opp. 4-5. *Amici* take no position on that case-specific point.

(Scalia, J., concurring). Following *Apprendi*, this Court can be expected to overrule *Neder*, and the Court should therefore not take up a case, such as the present one, which calls for a novel application of it to a significantly different context.

Fealty to Congress' scheme of offenses in § 841 demonstrates that any application of *Neder* to this case would be an unwarranted extension of this undermined precedent. The fact omitted from the superseding indictment would not complete the congressionally defined offense of which the respondents were convicted, but rather would convert the offense of conviction into a greater-inclusive congressionally defined offense. Moreover, in this case, application of *Neder* would not just change the offense of conviction; it would also require that the indictment be amended to include the greater offense, which is impossible. *Stirone v. United States*, 361 U.S. 212, 219 (1960). Because *Neder* is dubious in provenance and prognosis, this Court should not extend it, particularly in a case implicating *Apprendi*.

In *Reed v. Ross*, 468 U.S. 1 (1984), considering whether a procedural default should be excused in a habeas corpus proceeding, this Court suggested criteria for judging whether the novelty of an issue makes it "not reasonably available to counsel." *Id.* at 17. In that case, the Court found the available support sufficiently sparse to excuse an absence of objection, even though at the time of Ross's appeal, "one Federal Court of Appeals had held that it was unconstitutional to require a defendant to disprove an essential element of a crime for which he is charged." *Id.* at 18. By contrast, at the time of sentencing in this case, a solid body of entrenched precedent, including but not limited to binding authority

in the governing Circuit,[12] held that statutory maximums could be increased as a result of findings made by the court at the time of sentencing by a mere preponderance standard. *See Monge v. California*, 524 U.S. 721 (1998); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *United States v. Powell*, 886 F.2d 81, 84-85 (4th Cir. 1989).

Had an objection on constitutional grounds been lodged at sentencing, it not only would have necessarily been overruled, but there would also have been nothing the prosecutor or the court could have done to insulate themselves against the possibility of a change in the law, as in fact occurred in *Apprendi*. The purposes of the "plain error" rule would therefore not be served in the slightest by applying it in the present circumstances. Yet the government's petition assumes the rule applies even when it serves no purpose -- and that it applies to illegal sentences[13] -- without defending that proposition. For this reason as well, the petition should not be granted.

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[12] *See* note 17 *post*. This is therefore not a case where the argument was simply "unacceptable to that particular court at that particular time." *Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982); *see also Bousley v. United States*, 523 U.S. 614, 622-23 (1998) (rejecting contention that *Bailey* argument under 18 U.S.C. § 924(c) was "not reasonably available to counsel").

[13] *But see Heflin v. United States*, 358 U.S. 415 (1959) (illegal consecutive sentence for offense inapplicable to petitioner in light of convictions on other counts, vacated by unanimous Court on post-conviction attack, without mention of effect of lack of prior objection or appeal). Because the government's petition merely assumes that a "plain error" analysis as developed in cases discussing trial error can be applied *ipso facto* to sentencing issues, that important question also is not ripe for consideration in this case. *See also Thomas*, slip op. at 20-21 (declining to decide precise nature of *Apprendi* violation creates trial error as well as sentencing error).

3. The Petition attempts to frame the question so as to obscure the essential point that no fact necessary to the indictment's validity was omitted in this case; the indictment properly charges a felony carrying a 20-year sentence, but not one allowing a life term.

Certiorari is also not appropriate in this case because the petitioner, in its framing of the Question Presented, seeks to have this Court rule on the broader question of the effect of an unobjected-to omission from an indictment of an essential element of the offense. Pet. 20-22. Yet at the same time the petitioner refuses to address the question whether the threshold quantities set forth in the various subsections of 21 U.S.C. § 841(b) are such an element in a drug conspiracy case under *id.* § 846.

The superseding indictment against respondents omitted no element of the charged offense. It properly and fully averred every element of a conspiracy under 21 U.S.C. § 846 to violate *id.* § 841, without specifying what particular quantity of a controlled substance was to be distributed as the object of the conspiracy. The government recognizes that the maximum penalty for such a conspiracy is 20 years' imprisonment, with no mandatory minimum sentence.[14] This Court has long recognized that a sentence in a federal case for a more serious degree of offense than is supported by the words of the indictment is illegal and must be corrected, even if first raised on collateral attack. *Tinder v. United States*, 345 U.S. 565 (1953)(statute making postal theft a misde-

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[14] It is settled that the offense which was the object of a conspiracy must be set forth. *Joplin Merchandise Co. v. United States*, 236 U.S. 531, 535 (1915).

meanor unless value of mail stolen exceeded $100 made value an element of the felony; therefore, indictment charging theft of mail without specifying value charged only misdemeanor, requiring correction of sentence on review under 28 U.S.C. § 2255, notwithstanding absence of objection at trial or on appeal).[15] *A fortiori*, where, as here, an illegal sentence is raised as a claim on direct appeal, that error must at least be deemed plain -- even assuming Rule 52(b) applies -- and must in any event be corrected, to avoid a miscarriage of justice and to maintain the integrity and public reputation of the courts.[16]

Without any need to rely upon the doctrine of constitutional doubt and irrespective of the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it can in fact be seen that Congress intended drug types and amounts in 21 U.S.C. § 841 to be offense elements always, for all purposes. *United States v. Vazquez*, 271 F.3d 93, 107-15 (3d Cir. 2001) (en banc) (Becker, Ch.J., concurring, joined by Ambro, J.). The decisions of all circuits to the contrary are erroneous and should, in the proper case, be overruled by this Court.[17]

Having ascertained by reference to this congressional intent what offense is alleged in the indictment, this Court would face the inescapable conclusion that the sentences imposed on the respondents exceed any validly authorized, congressionally defined maximum for the charged offense. Such excessive sentences are simply illegal; they cannot be saved, under the guise of plain- or harmless-error review, by what amounts to an appellate court-directed verdict for a greater-inclusive offense.

The district court also lacked any statutory jurisdictional basis to punish unalleged congressionally defined

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[15] In the *Tinder* opinion, this Court did not even mention whether the proof of value was disputed, or was "overwhelming," nor whether the defendant was surprised or lacked actual notice. Upon ascertaining that proof of value was an element distinguishing the felony from the misdemeanor, the Court simply remanded the case, noting that the sentence was illegal, in that it exceeded the statutory maximum for a misdemeanor, and therefore must be corrected.

[16] *Compare Silber v. United States*, 370 U.S. 717 (1962) (per curiam) (failure of indictment to allege essential facts, necessary to determine whether averment of element was legally supportable, required reversal as "plain error," without having been raised on appeal or in briefing to Supreme Court), applying *Russell v. United States*, 369 U.S. 749 (1962), *with Hagner v. United States*, 285 U.S. 427, 433 (1932) (harmless error doctrine does not "dispense with the rule which requires that the essential elements of an offense must be alleged; but ... it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment").

[17] Every Circuit has definitively construed drug amount (and often drug type as well) to be sentencing enhancement factors to be determined by the judge, post-verdict, by a preponderance of the evidence. See *United States v. Barnes*, 890 F.2d 545, 551 n.6 (1st Cir. 1989); *United States v. Campuzano*, 905 F.2d 677, 678-79 & n.1 (2d Cir. 1990); *United States v. Lewis*, 113 F.3d 487 (3d Cir. 1997); *United States v. Powell*, 886 F.2d 81, 84-85 (4th Cir. 1989); *United States v. Morgan*, 835 F.2d 79, 81 (5th Cir. 1987); *United States v. Moreno*, 899 F.2d 465, 472-74 (6th Cir. 1990); *United States v. Acevedo*, 891 F.2d 607, 611 (7th Cir. 1989); *United States v. Wood*, 834 F.2d 1382, 1388-90 (8th Cir. 1987); *United States v. Sotelo-Rivera*, 931 F.2d 1317, 1319 (9th Cir. 1991); *United States v. McCann*, 940 F.2d 1352, 1354, 1358 (10th Cir. 1991); *United States v. Smith*, 840 F.2d 886, 888 (11th Cir. 1988); *United States v. Patrick*, 959 F.2d 991, 995 n.5 (D.C. Cir. 1992). If the Court does not overrule those cases, the only proper course will be to declare § 841 unconstitutional on its face under *Apprendi*. *See United States v. Buckland*, 259 F.3d 1157 (9th Cir. 2001), *vacated for rehearing en banc*, 259 F.3d 1169 (9th Cir. 2001).

offenses. The statute conferring jurisdiction in criminal cases provides in pertinent part: "The district courts of the United States shall have original jurisdiction ... of all offenses against the laws of the United States." 18 U.S.C. § 3231. This statute does not provide a roving grant of authority to punish all federal crimes district courts may encounter.[18] Rather, the statute confers jurisdiction on district courts "to render judgment on the indictment." *United States v. Williams*, 341 U.S. 58, 66 (1951). The Solicitor General's attempt to quarrel with the Fourth Circuit's characterization of the alleged defect -- omission of a fact necessary to raise the grade of offense -- as "jurisdictional" (Pet. 14-18) is purely semantic.

This indictment did not *omit* any element necessary to charge an offense. Rather, the prosecutor who drafted the indictment intentionally (if erroneously) omitted any averment of a fact which the Solicitor General now concedes (Pet. 10 n.2) is necessary to charge the higher grade of drug offense. In Judge Aldisert's unforgettable phrase, describing exactly the government's argument in this case, the appellate courts should not act as a "circus hand following the prosecutorial elephant around the sawdust trail." *United States v. Gibbs*, 813 F.2d 596, 603 (3d Cir. 1987) (dissenting op.). Respondents were indicted for conspiring to distribute cocaine base in an unspecified quantity, a 20-year offense, but sentenced for conspiring to distribute more than 50 grams of "crack." Such sentences fall outside the jurisdiction of the district court to impose and of any appellate court to affirm.

In any event, the error detected by the court below was "jurisdictional" in just the sense discussed in older

[18] Were it so, a defendant would be placed in jeopardy for all federal crimes when tried for any federal crime.

habeas cases of this Court. *See Haas v. Henkel*, 216 U.S. 462, 476-81 (1910); *Hyde v. Shine*, 199 U.S. 62, 78-83 (1905); *Ex parte Yarbrough*, 110 U.S. 651 (1884) (giving full consideration, on habeas, to question whether indictment charged an offense).

The jurisdiction of the district court (and hence of the court of appeals or of this Court[19]) is statutorily limited to the offense charged. Thus, under any standard of review, the court below had no choice but to reverse a sentence for the uncharged, greater-inclusive offense of a conspiracy to possess more than five kilograms of cocaine. *Gibbs*, 813 F.2d at 603-10 (Aldisert, J., dissenting); *see also Sanchez*, 2001 WL 1242087, *41-*49 (Barkett, J., concurring); *Vazquez*, 271 F.3d at 116-22 (Sloviter, Mansmann, Nygaard & McKee, JJ., dissenting); *id.* at 126-30 (Rendell & Roth, JJ., dissenting); *Promise*, 255 F.3d at 186-95 (Motz, Widener, Michael & King, JJ., dissenting).

For this further reason, as well as those discussed in the respondents' brief in opposition, the petition for writ of certiorari should be denied.

[19] *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), quoting *United States v. Corrick*, 298 U.S. 435, 440 (1936).

CONCLUSION

For the foregoing reasons, and for the reasons given by the respondents, this is not the case in which this Court should address the developing split in the Circuits on the "jurisdiction" of a federal court to sentence for a more serious degree of the offense charged than that set out in the indictment, or the applicability of the "plain error" rule in such cases. The government's petition should be denied.

Respectfully submitted,

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ADDENDUM

NACDL is a District of Columbia nonprofit corporation with more than 10,000 attorney-members nationwide and 80 state and local affiliate organizations with 28,000 members in all 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL defends the individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled properly and justly. To promote the proper administration of justice and appropriate measures to safeguard the rights of all person involved in the criminal justice system, NACDL files at least ten *amicus* briefs in this Court each Term on a variety of criminal justice issues.

FAMM is a nonprofit, nonpartisan organization with 24,000 members and 35 Chapters nationwide. FAMM conducts research, promotes advocacy and educates the public regarding the excessive cost of mandatory minimum sentencing. The cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary to the prosecution. FAMM does not argue that crime should go unpunished, but rather that the punishment should fit the crime and the culpability of

the offender. FAMM therefore has a special interest in ensuring that sentencing law and practice result in just outcomes, and to the extent that mandatory sentences are required by law, that they be arrived at consistently with statutory and constitutional mandates.